IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1429~~ 70-93

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DISTRICT UNION NO. 271, AS AMICUS CURIAE.

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INTRODUCTION.

This *amicus* brief is filed by the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, District Union No. 271, as provided in Rule 42(2) of the Rules of the Supreme Court, petitioner and respondent having given their consent for the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union No. 271 to file as *amicus curiae.*

The opinions below, jurisdiction, question presented and the statutory provisions involved are set out in the petitioner's brief.

INTEREST OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DISTRICT UNION NO. 271.

The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union No. 271 (hereinafter referred to as "the Union") was the Respondent in the injunction proceedings in the District Court of Hall County, Nebraska, and unsuccessfully sought to intervene as a party plaintiff in the proceedings brought by the National Labor Relations Board (hereinafter sometimes referred to as "Board" or "NLRB") in the United States District Court, District of Nebraska. The Union was also an appellant in the proceedings below. The Union sought intervention in the Federal District Court as a matter of right on the ground that a federal ruling against the Board could be used by Nash-Finch Company (hereinafter referred to as "the Company" in the State Court litigation to rebut the Union's claim that the Company's suit trenches on federally protected rights. Because the outcome of this litigation, to determine whether the NLRB can obtain a federal court injunction to restrain a state court from prohibiting the Union from peacefully picketing, will directly affect the Union's interests, this brief presents the Union's views of the issue before this Court.

ARGUMENT.

I. THE NEBRASKA ANTI-PICKETING STATUTE AND THE STATE COURT INJUNCTION ISSUED THEREUNDER ARE UNLAWFUL INFRINGEMENTS ON CONSTITUTIONAL AND FEDERALLY PROTECTED RIGHTS.

A. The Nebraska Statute Is Unconstitutionally Broad and Vague.

The Nebraska anti-picketing statute (Sections 28-812, 28-814.01 and 28-814.02, R. S. Neb. 1964) prohibits, *inter alia,* "loitering about, picketing or patrolling" so as "to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment." The statute also prohibits "mass picketing" which is defined as picketing in which there are more than two pickets at any time within fifty feet of any entrance or of another picket. Pursuant to this statute, the District Court of Hall County, Nebraska enjoined the Union *inter alia* from:

1. distributing hand bills or literature in any manner which slows traffic;
2. picketing entrances or exits of the Company's stores;
3. instigating conversations with the Company's customers "in any matter relating to the dispute herein"; and
4. doing any act in violation of the State anti-picketing law.

Further, the Court limited the number of pickets to two per store, proscribed picketing by other than bona fide members of the Union unless such person submitted to the

Court's jurisdiction by filing an appearance therein as a defendant, and prohibited anyone other than pickets from displaying signs or distributing handbills "or caus[ing] to be published or broadcast any information pertaining to the dispute existing between the parties hereto" (A. 7-8).

In considering the impact of the decision of the Court below it is important to note the clear unconstitutionality of the Nebraska anti-picketing law and of the injunction issued by the Nebraska Court pursuant to that law, as well as the lack of state court jurisdiction over this preempted area of peaceful concerted activity. See *e.g., Thornhill* v. *State of Alabama,* 310 U. S. 88 (1940); *Liner* v. *Jafco, Inc.,* 375 U. S. 301 (1964); *United Auto Workers* v. *O'Brien,* 339 U. S. 454 (1950); *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968); *Carlson* v. *People of State of California,* 310 U. S. 106 (1940); *Bakery Drivers* v. *Wohl,* 315 U. S. 769 (1942); *Milk Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 292 (1941); *Youngdahl* v. *Rainfair, Inc.,* 355 U. S. 131 (1957); *Garner* v. *Teamsters Union,* 346 U. S. 485, 499-500 (1953); *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 245 (1959). For example, § 28-812, R. S. Neb. 1964, which defines unlawful picketing, on its face prohibits peaceful picketing for any lawful purpose unless the person picketed consents to such activity. Such a provision is an unconstitutional limitation on free speech. See *Amalgamated Food Employees Union* v. *Logan Valley Plaza, supra; Thornhill* v. *State of Alabama, supra.* Equally unconstitutional is subsection (1) of § 28-814.02, which defines "mass picketing" as two pickets within 50 feet of any entrance or of one another. By so limiting the number of pickets without regard to the factual circumstances in particular cases, the Nebraska legislature has gone far beyond the area of permissible regulation of conduct protected by the First Amendment. See *Milk Drivers Union* v. *Meadowmoor Dairies, supra; Thornhill* v.

State of Alabama, supra; Carlson v. *People of State of California, supra; Davis* v. *Francois,* 395 F. 2d 730, 735 (5 Cir. 1968).[1] Subsection (2) of § 28-814.02 also suffers a constitutional infirmity under the First and Fourteenth Amendments by regulating the content of picket signs and the size of type appearing thereon. See, *e.g., Talley* v. *State of California,* 362 U. S. 60 (1960); *Zwickler* v. *Koota,* 290 F. Supp. 244, 251-258 (E. D. N. Y., 1968) (3 judge court), reversed on other grounds *sub nom. Golden* v. *Zwickler,* 394 U. S. 103 (1969).

B. The State Court Injunction Unconstitutionally Prohibits Activity Protected by the First Amendment.

The breadth of the Nebraska Court's injunction restraining the Union from "doing any act in violation of" the criminal picketing statute and the resulting threat of contempt proceedings for any statement or act which might subsequently be determined to have violated that far-reaching law, clearly violates the First Amendment rights of those enjoined. See, *e.g., Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931).

Equally impermissible under the First Amendment are the provisions which prohibit anyone from picketing who is not a "bona-fide" member of the Union "unless such person shall have first submitted himself or herself to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;" which prohibit pickets from "instigating conversations with plaintiff's customers in any matter relating to the dispute herein;" and which restrain anyone other than the named defendants and qualified pickets from, on behalf of the Union, "in any manner whatsoever" picketing the Com-

1. In the instant case, the State Court injunction is even more restrictive than the statute insofar as it limited the number of pickets to two per store.

pany's premises, displaying signs or distributing handbills or literature, or "caus[ing] to be published or broadcast any information pertaining to the dispute existing between the parties hereto" (A. 7-8). The cases cited *supra*, p. 4, make clear beyond cavil that the limitations thus imposed by the State Court must not be permitted to stand. They constitute a blatant infringement on the right of free people to express their views and thoughts.

C. The State Court Injunction Entered Upon a Federally Preempted Area.

Nor is extended discussion required to establish that the picketing enjoined by the Nebraska Court is activity protected by Section 7 of the National Labor Relations Act and therefore a federally preempted area over which the State Court has no jurisdiction. *Garner* v. *Teamster Union, supra; San Diego Building Trades Council* v. *Garmon, supra.* This Court noted in *Garner*,[2] that the National Labor Relations Act contains a:

> detailed prescription of the procedure for restraint of specified types of picketing [which] would seem to imply that other picketing is to be free of other methods and sources of restraint * * *. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare free picketing for purposes or by methods which the federal Act prohibits.

The vital importance of preventing state injunctions from frustrating federal policy outweighs considerations of comity between state and federal courts. This is an area of judicial decision

> * * * within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. * * * When a federal statute [protects] an

2. 346 U. S. at 499-500.

> act as [lawful] the extent and nature of the legal consequences of the [protection], though left by statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, Cl. 2; * * *. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).

To deprive the NLRB of access to the federal courts to ensure uniform regulation of the federal statute it administers would frustrate national policy.

II. SERIOUS HARM TO THE UNIFORM ENFORCEMENT OF FEDERAL LABOR LAW WOULD RESULT FROM PERMITTING STATES TO EXERCISE UNRESTRICTED REGULATORY POWERS OVER PEACEFUL PICKETING.

The necessity that Section 2283 be applied so as to permit the National Labor Relations Board to seek federal injunctive relief against state regulation of picketing is made evident by analysis of the diverse state statutes "imping[ing] on th[is] area of labor combat." *Garner*, 346 U. S. at 500.

A. State Statutes Regulating Peaceful Picketing Are Various and Diverse.

Twelve states have laws specifically regulating peaceful picketing.[3] For example, the North Dakota Statute provides that:

> in any strike in this state it shall be illegal for any person other than an employee of the particular establishment against which such strike is called or a local

3. Arkansas [§ 81-207, Ark. Stat. Ann.]; Colorado [§ 80-5-8(15), Colo. Rev. Stat.]; Florida [Chap. 21968, Fla. Stat.]; Hawaii [§ 300-2, Rev. Laws of Hawaii]; Minnesota [§ 179.11, Minn. Stat.]; Nebraska [§ 28-812, 28-814.01, 28-814.02, R. S. Neb.]; North Dakota [§ 34-0912, N. D. Rev. Code]; South Dakota [§ 17.1112, S. D. Code]; Texas [Art. 5154d V. A. C. S.]; Utah [§ 34-20-8, Utah Code Ann.]; Virginia [Ch. 674, § 40-64, Code of Virginia]; and Wisconsin [§ 111.06 (2), Wisc. Stat.].

> resident member of union representing the employees of such establishment to picket in aid of such strike [Sec. 34-0912, N. D. Rev. Code].

See also, Chap. 674, § 40-64, Code of Virginia, and Sec. 17.1112(5), South Dakota Code. Several states have statutory definitions of what constitutes prohibited mass picketing:

> picketing by a greater number than five percent of the first one hundred striking or locked out employees of the picketed employer and one percent of the employees in excess of this number * * * [§ 17.112(5), South Dakota Code].
>
> * * * * *
>
> any form of picketing in which: 1. There are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets [Art. 5154d, § 1, V. A. C. S.—Texas].[4]

In some states where no statute specifically regulates picketing, vague and broad criminal statutes prohibiting interference with business can be utilized to enjoin peaceful picketing.[5] For example, the Code of Alabama provides:

> Sec. 54. CONSPIRACY, COMBINATION OR AGREEMENT TO INTERFERE WITH OR HINDER BUSINESS, UNLAWFUL—Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business, shall be guilty of a misdemeanor [Title 14, Chap. 20].[6]

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4. The Nebraska statute passed in 1949 is identical to this 1947 Texas statute in its definition of mass picketing.

5. Alabama [Title 14, Chap. 20, § 54, Title 26, § 336, Code of Ala.]; Connecticut [§ 53-179, Gen. Stat. of Conn.]; and Delaware [Chap. 197, L. 1961 (amended, Chap. 351, L. 1966)].

6. The companion section, Sec. 55, prohibiting loitering and picketing was declared unconstitutional by this Court in *Thornhill* v. *State of Alabama*, 310 U. S. 88 (1940).

* * * * * *

Sec. 336. INTERFERENCE WITH EMPLOYMENT. Any person who * * * by any means of duress, prevents or seeks to prevent another from doing work or furnishing materials, or from contracting to do work or furnish materials, for or to any person engaged in any lawful business, or who disturbs, interferes with, or prevents, or in any manner attempts to prevent the peaceable exercise of any lawful industry, business or calling by any other person, must, on conviction, be fined not less than ten nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months [Title 26].

See *Hardie-Tynes Mfg. Co.* v. *Cruse,* 189 Ala. 66, 66 So. 657, where the Alabama Supreme Court held that this law constitutionally could prohibit picketing and peaceful solicitations where the intent and effect of such activity was to interfere with business operations.

B. The Uniformity of Federal Labor Law Could Be Seriously Impaired by Adherence to the Rationale of the Court Below.

The impact of the decision of the Eighth Circuit Court of Appeals in the instant case would be to submit clearly federally protected rights to the vagaries of State laws such as those cited above. Any picketing at all may be held to be legal at a Georgia location but illegal across the border in Alabama. Picketing by more than two persons could be prevented in Nebraska, restricted in South Dakota, North Dakota and Minnesota but legally permissible in Iowa—all contiguous jurisdictions. Such a situation clearly "impinge[s] on the area of labor combat designed to be free" from restraint, and obstructs paramount fed-

eral policy. *Garner,* 346 U. S. at 500.[7] The federal government must have access to the federal courts to protect from varying degrees of state impairment the federally protected rights guaranteed by Section 7 of the National Labor Relations Act and to ensure continued uniform development of national labor policy. As this Court said in *Liner* v. *Jafco, Inc.,* 375 U. S. at 306-308:

> If the peaceful picketing complained of in this case is [arguably protected or prohibited] conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it. Weber v. Anheuser-Busch, Inc., 348 U. S. 468. The issuance of the state injunction in this case tended to frustrate this federal policy. This would be true even if the picketing were prohibited conduct * * *.

Federal injunctive relief is particularly vital in cases such as the instant case where state injunctions have dele-

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7. Moreover, it should be noted that many of the states having statutes regulating picketing (Arkansas, Florida, Nebraska, South Dakota, Texas and Virginia) or prohibiting interference with business (Alabama and Delaware) do not have anti-injunction statutes (so-called "little Norris-LaGuardia Acts") preventing restraints in labor disputes. Thus judges in those states are free to issue broad injunctions, such as that issued by the Nebraska Court herein, regulating picketing activity in conjunction with unfair labor practice strikes or other labor disputes. For example, in *Machinists* v. *Stephens,* 437 S. W. 2d 917 (Texas Ct. Civ. App. 1968) the trial court enjoined the Union from in any manner interfering with Stephens' business, the effect of which was to prohibit all peaceful picketing. The Texas Supreme Court, thirteen months after the trial court's decision, modified the injunction to prohibit only public display of misrepresentation. In *McMahon* v. *Milam Mfg. Co.,* 127 So. 2d 647, reversed *per curiam,* 368 U. S. 7 (1961), the trial court decision, affirmed by the Mississippi Supreme Court, enjoined all peaceful picketing advertising the existence of a strike at another location of an alleged single employer. State laws and court decisions based thereon show the variety of results and conflicts which may result from such a departure from the *Garmon* rationale.

terious effect on the free expression of grievances against persons who have committed unfair labor practices.

> [T]he granting of injunctive relief against a participant in a labor dispute, as the state court did in this case, is a matter Congress intended to be done only after sensitive procedures have been followed. An injunction in a labor dispute may cause irreparable harm. Use of the injunction as a panacea against strikes and other concerted activity was widespread before the adoption of our national labor legislation, and the devastating effect it had upon labor organizations was one of the strongest reasons for our national laws. *N. L. R. B.* v. *Roywood Corporation,* 429 F. 2d 964, 968 (5 Cir. 1970).

By the time injunctions are removed through lengthy appellate processes, resumption of picketing is often futile due to the dissipation of employee and public interest, employee turnover and other changes in the situation.

It is not sufficiently protective of overriding federal labor policies that this Court may ensure uniformity by reviewing conflicting state court decisions regulating labor activities.

> Once [a state court injunction] is granted, the long, drawn-out appeal through the state hierarchy and on to this Court commences. Yet by the time this Court decides that from the very beginning the state court had no jurisdiction, as it must under the principle of *Garner* * * *, a year or more has passed; and time alone has probably defeated the claim. *Amalgamated Clothing Workers* v. *Richman Brothers,* 348 U. S. at 526 (1955) (Justice Douglas, dissenting).

The above-cited estimate of a one year delay to process an appeal was optimistic. The injunction issued by the State Court in *Bakery & Pastry Drivers* v. *Wohl,* 315 U. S. 769

(1942) remained in effect for three years before this Court set it aside. This time lag is not unusual. See *Interlake Steamship Co.* v. *Marine Engineers Ass'n,* 370 U. S. 173 (1962);[8] *McMahon* v. *Milam Mfg. Co.,* 368 U. S. 7 (1961);[9] *Broadcast Service of Mobile Inc.* v. *Local 1264, I. B. E. W.,* 380 U. S. 255 (1965);[10] *Hattiesburg Bldg. Trades Council* v. *Broome,* 377 U. S. 126 (1964);[11] *Ex Parte George,* 371 U. S. 72 (1962);[12] *Liner* v. *Jafco, Inc.,* 375 U. S. 301 (1964).[13] Even in cases where the injunctions are invalidated or modified within the state court appellate processes, long delays are inherent. See *City Line Open Hearth* v. *Hotel Employees,* 413 Pa. 420, 197 A. 2d 614 (Pa. S. Ct. 1964) [one year]; *Schwartz-Torrence Investment Corp.* v. *Bakery Workers,* 394 P. 2d 921, 40 Calif. Rptr. 233 (Calif. Dist. Ct. App. 1963), cert. denied, 380 U. S. 906 (1965) [17 months]; *Great Leopard Market* v. *Amalgamated Meat Cutters,* 413 Pa. 143, 196 A. 2d 657 (Pa. S. Ct. 1964) [one year]; *Continental Slip Form Builders* v. *Laborers Local 1290,* 195 Kan. 572, 408 P. 2d 620 (Kansas S. Ct. 1965) [31 months]; *Corrigan* v. *Barbers Union,* ..... P. 2d ....., 65 LRRM 2973 (Calif. S. Ct. 1967) [25 months]; *Machinists*

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8. The injunction issued in November 1959 was invalidated in June 1962: see 260 Minn. 1, 108 N. W. 2d 627 (Minn. S. Ct. 1961).

9. The Mississippi Court enjoined peaceful picketing in March 1959; this Court reversed the lower court's opinion in October, 1961: see 127 So. 2d 647 (Miss. S. Ct. 1961).

10. An injunction against peaceful picketing in violation of Alabama law cited *supra,* pp. 8-9, was issued in September 1963 and invalidated in March 1965: see 159 So. 2d 452 (Ala. S. Ct. 1963).

11. An injunction issued by a Mississippi court in October, 1961 was dissolved in April 1964: see 153 So. 2d 695 (Miss. S. Ct. 1964).

12. The injunction was in effect from June, 1961 to November 1962: see 358 S. W. 2d 590 (Tex. S. Ct. 1962).

13. In January 1964, this Court invalidated a temporary injunction issued by a Tennessee court in August 1960: see ..... Tenn. ....., 49 LRRM 2382 (Tenn. Chanc. Ct. 1961), 49 LRRM 2585 (Tenn. Ct. App. 1961).

v. *Stephens,* 437 S. W. 2d 917 (Texas Ct. Civ. App. 1968) [13 months].

As we have shown above, important considerations of uniform interpretation of federal law require exercise of federal jurisdiction to prohibit state regulation of peaceful picketing which is either arguably protected or prohibited. There is additional compelling reason for federal intervention where protected activity is involved. Whereas prohibited activity may be justifiably subject to injunctive control, no justification exists for such interference with protected activity in the form of peaceful picketing. Thus when state courts prohibit clearly lawful activities protected by the NLRA, such as here, the serious harm to employees' rights continues until vindicated through laborious and time consuming appellate procedures. Therefore, injunctive relief in federal court must be available to expedite review of interference with rights guaranteed by the NLRA and the First and Fourteenth Amendments to the Constitution. In the instant case, for example, the Federal District Court decision issued only three months after the issuance of the state court injunction. While any judicial interference with lawful picketing has deleterious effects upon such activity, the relative speed of the federal court's determination renders that forum more efficacious than the state courts in which it may take three years to invalidate anti-picketing injunctions.

Moreover, the federal court is clearly the appropriate forum for the NLRB, as the administrator of national labor policy, to bring litigation to protect the public rights articulated in the NLRA. As the Court of Appeals for the Fifth Circuit said in *N. L. R. B.* v. *Roywood Corporation,* 429 F. 2d at 970:

> the impact of national labor legislation cannot be confined to those cases in which the Board had under-

> taken proceedings, whether formal or informal. As we have already indicated, refusal by the Board to take action may mean that it views the conduct it is being asked to act against as protected by law. Thus an injunction by a state court interfering with arguably protected conduct may pose dangers of conflict with the federal scheme of regulation irrespective of whether the Board is hearing a formal controversy at the time. In such a case, the Board is entitled to sue and entitled upon proving its case to an injunction, not merely to protect its jurisdiction over a particular controversy but to safeguard the integrity of the national labor laws. When the Board so sues, it need not fit its case into one of the confining exceptions of section 2283, nor need it bear the heavy burden of showing its case "exceptional" in immediate impact between the parties to the dispute. It sues not as a private party but as an agency of the United States Government charged with administering the national labor laws, and its judgment that there is sufficient danger to those laws to warrant an injunction is entitled to great weight.

The Eighth Circuit's attempted distinction between the United States and the NLRB is clearly spurious insofar as it fails to recognize the importance of the Board's function as the primary agency of the United States which is empowered to protect national labor policy expressed in §§ 7, 8 and 9 of the National Labor Relations Act. Accordingly, as the Court recognized in *Roywood, supra,* the Board must be in a position to stop state proceedings which, in the Board's judgment, will impair the administration of that national policy. Nothing in *Amalgamated Clothing Workers* v. *Richman Bros. Co.*[14] derogates from the foregoing conclusion. For in *Richman* a private party seeking to protect private rights brought suit in federal court to enjoin state court proceedings. The policy distinctions between cases in which the "federal government seeks the aid

14. 348 U. S. 511 (1955).

of its courts in protecting a federal interest," and cases brought by a private party which threaten to interfere with federal-state comity have been recognized by this Court. *Leiter Minerals* v. *United States,* 352 U. S. 220 (1957). The exercise of federal jurisdiction at the Board's behest would not bring the state and federal judiciary into frequent conflict. For the Board would be able to screen cases involving state injunctions and bring federal litigation only when, in the Board's view, state proceedings threatened serious impairment of national labor policy. As this Court said in *Leiter Minerals* v. *United States,* 352 U. S. at 225-226:

> The statute [Sec. 2283] is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks to prevent threatened irreparable injury to a national interest.
>
> The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U. S. C. Section 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U. S. C. § 2283 alone.* * *

The "frustrations of superior federal interests" would result not only from the denial of the right for the NLRB to utilize the federal courts to ensure uniform application of the NLRA rather than potentially conflicting, disparate rulings on protected picketing from state to state, but also from the inordinate delays evident in picketing cases processed through state appellate processes.

CONCLUSION.

For the foregoing reasons, as well as those set out by the Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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